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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 44

CLEMENTE MARTINEZ PEREZ,
Petitioner,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INDEX

	Page
I. The Basic Issue	1
II. The "Expatriating" Acts Here Involved	6

Authorities

Cases:

Huber v. *Reily*, 53 Pa. St. 112 (1866)	7
Knauer v. *United States*, 328 U.S. 654	2
Kurtz v. *Moffitt*, 115 U.S. 487	4, 7
Mackenzie v. *Hare*, 239 U.S. 299	4, 5
Perkins v. *Elg*, 307 U.S. 325	3
Savorgnan v. *United States*, 338 U.S. 491	4
Schneiderman v. *United States*, 320 U.S. 118	2
United States v. *Wong Kim Ark*, 169 U.S. 649	4

Constitution of the United States:

Art. I, § 8	2
Fifth Amendment	6

Statutes:

Act of March 3, 1865, c.79, 13 Stat. 490	3, 7
Act of July 27, 1868, c. 249, 15 Stat. 223	3
Act of September 22, 1922, c. 411, 42 Stat. 1022	5
Act of August 7, 1946, c.769, 60 Stat. 865	9
Act of August 16, 1951, c. 321, 65 Stat. 191	9
Act of June 27, 1952, c. 477, 66 Stat. 267	2
Act of July 20, 1954, c. 553, 68 Stat. 495	9
Nationality Act of 1940, c. 876, 54 Stat. 1137, as amended, 58 Stat. 4 (1944), 58 Stat. 677 (1944):	
§ 401(a)	5
§ 401(b)	5
§ 401(e)	5, 6, 7, 9
§ 401(j)	6

Legislative Materials:

	Page
H. Doc. No. 326, 59th Cong., 1st Sess.	6
H. Rep. 216, 74th Cong., 1st Sess.	9
H. Rep. 1469, 81st Cong., 2d Sess.	9
H.R. 5799, 74th Cong.	8, 9

Miscellaneous:

Roche, The Loss of American Nationality, 99 U. Pa. L. Rev. 25 (1950) 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 572

CLEMENTE MARTINEZ PEREZ,

Petitioner,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The brief filed by the Government in this case is written to be applicable in each of the several expatriation cases now pending in this Court. No doubt this avoids some duplication, but the consolidation of arguments in cases which involve different facts and different considerations inevitably blurs the issues in each individual case. A brief reply, we hope, will aid in clarifying the issues in *this* case.

I

The Basic Issue

The brief filed by the Government unfortunately directs its principal attention to disproving a position which peti-

tioner does not assert. Petitioner does *not* urge, as the Government brief would have it (p. 13), that Congress "can do no more in this area [of expatriation] than implement or aid the citizen's own desire or intention to give up citizenship", or "that no American can be expatriated unless he desires or intends to lose his nationality." The extended effort of the Government to disprove those statements is wholly beside the point.

What we do contend, stated simply, is this: Congress may not provide for loss of native-born American citizenship[1] except where the citizen has acquired, by some voluntary act, a new nationality or allegiance. We can add, although we believe the issue is not raised by this case,[2] that

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[1] Since petitioner is a native-born citizen, there is no need here to explore the nature and extent of Congressional power to take away a citizenship conferred by naturalization. This Court has sharply divided on many issues raised by denaturalization laws and procedures *E.g., Schneiderman* v. *United States*, 320 U.S. 118; *Knauer* v. *United States*, 328 U.S. 654. More recent denaturalization provisions in the Immigration and Nationality Act of 1952 (Act of June 27, 1952, c. 477, 66 Stat. 267) appear to raise new issues which no doubt will ultimately be presented to this Court—particularly the extent to which Congress, in the exercise of its specific power over naturalization (Const., Art. I, Sec. 8), and the "necessary and proper" clause *(ibid.)*, may condition the "privilege" of naturalization upon future conduct of events. But the extent to which a naturalized citizen stands on the same footing as a native-born citizen is a question which may properly await a case in which it is raised. The references throughout the Government's brief to cases involving denaturalization can be put to one side.

[2] The Government suggests that petitioner "appears" to be a dual national (Br., p. 35). The District Court made no finding, nor did the Immigration and Naturalization Service (see Proceedings (unprinted) on file in the Clerk's office), that petitioner has or had any citizenship other than the American one here in issue.

We should also correct the Government's statement (Br. p. 36) that "There is no reason to believe that [the petitioner] will be unable to live in Mexico." There is "reason to believe" quite the opposite—that petitioner can *not* take up life in Mexico if deported there. The record of his hearing before the Special Inquiry Officer on July 16, 1953 (unprinted, on file with the Clerk) reveals (at p. 11) that when petitioner was asked to name the country to which he wished to be "deported", he

a native-born American citizen who, by reason of foreign law, is already a "dual national" must be accorded precisely equal protection. The extent of the power of Congress cannot be stated in quite the same way, because such a citizen already has a foreign nationality. For him the test can be said to be" has he, by some voluntary act, shown that he has made a firm decision to elect his foreign nationality.

This definition of the limits on Congressional power to de-citizenize native-born Americans is, we believe, consistent (a) with the historic basis of our attitude toward American citizenship; (b) with the prior decisions of this Court; and (c) with the consideration stressed by the Government—the necessity that Congress be enabled to deal with problems vis-a-vis other nations arising from dual or conflicting claims of citizenship and allegiance.

a. For almost the first century under the Constitution, far from asserting any power to deprive a native-born American of citizenship, Congress was concerned with whether such citizenship could be relinquished even where the citizen wished to do so. Even when, in 1868 (Act of July 27, 1868, c. 249, 15 Stat. 223), Congress declared expatriation—the *voluntary* renunciation of citizenship, *Perkins* v. *Elg*, 307 U.S. 325, 334—to be "a natural and inherent right", it asserted no correlative power to deprive a citizen of his nationality and deport him, such as is now asserted in this case. That assertion of power comes very late in our constitutional history.[3]

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reluctantly answered "Mexico, as my family is there, but they are going to throw me out there, too." The Officer made no further inquiry, and the District Court made no finding to support the Government's easy assumption that upon petitioner's deportation he can become a permanent inhabitant of Mexico.

[3] It may be argued that the Act of March 3, 1865 (c. 79, 13 Stat. 490) represented an assertion of such power. That it was enacted *before* Congress recognized *any* right of expatriation; that it referred only to "rights of citizenship", rather than "citizenship" or "nationality"; and

b. The absence of Congressional power to declare citizenship forfeit for such acts as to it seem appropriate is wholly consistent with the decisions of this Court. On the one hand, there is the clear recognition of the status of native-born citizenship as a *constitutional* right. *United States* v. *Wong Kim Ark*, 169 U.S. 649, 703. The Court there made it clear that irrespective of the fact that one's parents were aliens ineligible for citizenship, one who is born in this country cannot, by legislative fiat, be deprived of a constitutional birthright—American citizenship. It noted that, although the Constitution specifically delegates to Congress a power to prescribe rules for naturalization, it is wholly silent on any grant of power to Congress to take away the citizenship which one acquires by birth in the United States and under its jurisdiction. Rights of individuals which arise from the Constitution are not—at least to now—subject to being taken away by a statute providing for administrative forfeiture.[4]

On the other hand, there is the very limited scope of the two decisions of this Court most relevant to this issue—*Mackenzie* v. *Hare*, 239 U.S. 299, and *Savorgnan* v. *United States*, 338 U.S. 491. In each, a native-born citizen voluntarily acquired a foreign citizenship—an act which is "one of the most obvious and effective forms of expatriation." *Savorgnan* v. *United States*, 338 U.S. 491, 498. We agree

that it was imposed only as a penalty after criminal conviction, *Kurtz* v. *Moffitt*, 115 U.S. 487, 501; are among the many factors which suggest that Congress had no intention of asserting any power such as it has sought to exercise in this case. See Roche, *The Loss of American Nationality*, 99 U. of Pa. L. Rev. 25, 26, 61 *et seq.* (1950).

[4] Congress may of course enact laws which punish proscribed conduct by deprivation of rights otherwise constitutionally protected—even life itself. Whether it could deprive a native-born citizen of his citizenship on *that* basis—as a criminal penalty—is not at issue here. The Government in effect concedes (Br. pp. 50-58) that the result reached here cannot be sustained as a punishment, since the constitutional protections accorded in criminal cases were wholly lacking.

that Congress may provide that one who thus elects to accept a foreign citizenship will not be heard to say that he did not intend to renounce American citizenship. In such cases the citizen is performing an unequivocal act which can at all times be interpreted as inconsistent with American citizenship. But decisions sustaining the power to make such an act conclusive evidence of renunciation lend no support to the validity of an equally conclusive presumption when the specified acts—such as voting in a foreign political election (Sec. 401(e))—do not require, and certainly do not necessarily connote—the acquisition of a new allegiance to a foreign power.[5]

c. It cannot be mere happenstance that the Court, while emphasizing the constitutional basis of citizenship, has recognized as an act of involuntary expatriation—an act as to which a subjective intent not to become expatriated is irrelevant—only the acquisition of a foreign citizenship. Foreign naturalization, as the Court pointed out in *Mackenzie* v. *Hare*, is an act which, in its international aspects, "may bring the Government into embarrassments and, it may be, into controversies." 239 U.S. at p. 312. The same can no doubt be said of an oath of allegiance to a foreign state. Of course Congress may, if it wishes, permit an American citizen to retain his citizenship, and assume such embarrassments and controversies as may arise.[6] But in the proper conduct of foreign affairs it may, and in Section 401(a) and (b) of the Act it has, accepted the view of the 1906 Citizenship Board: "No man should be permitted de-

[5] We need not consider the extent to which Congress might declare that acts such as voting in a foreign election should be presumptive evidence of voluntary abandonment of American citizenship. The present statute can be construed only as making the presumption conclusive.

[6] It has done so, for example, in the Cable Act, repealing the statute involved in *Mackenzie* v. *Hare*, Act of September 22, 1922, c. 411, 42 Stat. 1022.

liberately to place himself in a position where his services may be claimed by more than one government and his allegiance be due to more than one." H. Doc. No. 326, 59th Cong., 2d Sess., p. 23.

The significant fact, however, is that there is no such basis for the power which Congress has asserted in the two sections involved in this case—remaining out of the country to avoid the draft (Sec. 401(j)), and voting in a foreign political election (Sec. 401(e)). As to the former, the Government asserts (pp. 41, 46) that "international complications" may be involved, but as described, rather than asserted, they appear to be no more than the usual problems which arise whenever an American who has committed a serious crime flees or remains outside this country. Presumably the Government does not mean to suggest that citizenship can be made forfeit whenever any American commits a crime and becomes an international fugitive from justice. And as to voting, if a foreign country does not object to aliens doing so, there are patently no international problems.

II

The "Expatriating" Acts Here Involved

In our main brief, pp. 27-45, we have already dealt at length with the further objection to the two subsections here involved—that they are arbitrary and invalid under the Fifth Amendment. The brief filed by the Government, however, warrants brief additional comment.

A. *Section 401(j).* Our only additional comments in connection with the validity of this subsection relate to its nature as a criminal penalty. We do not disagree with the Government's assertion (p. 40) that the problem of draft evaders in a period of national emergency is serious, and that there are additional problems presented by persons

who, by flight from the country, avoid what the Government calls "ordinary criminal sanctions" (p. 41). What we cannot accept is the conclusion which the Government, while denying in words, appears willing to accept in fact—that this justifies an "extraordinary" criminal sanction, the forfeiture of citizenship.

We cannot otherwise construe the Government's extensive reliance (pp. 41-46) on Section 21 of the Act of March 3, 1865 (c. 79, 13 Stat. 490), which forfeited the "rights of citizenship" of draft evaders, whether they left the United States or not. That act imposed a criminal penalty, and because it did so, it required a criminal conviction before the forfeiture could be invoked. *Kurtz* v. *Moffitt*, 115 U.S. 487, 501; *Huber* v. *Reily*, 53 Pa. 112, 119 (1866). Nor can we find anything but a clear implication of punishment in the comments of the Attorney General, which the Government twice quotes (pp. 45, 54) that draft evaders who leave the United States are "less worthy of citizenship" than are persons already subject to the expatriation laws. Nor is it helpful in dispelling this impression to find the comments of the Chairmen of the Senate and House Committees who reported legislation based on the Attorney General's proposal, and who characterized it as imposing a penalty (our main brief, pp. 37-39), as "the looseness of common parlance (Gov't Br., p. 55). And if this be "penalty" or "punishment" for unworthy conduct, admittedly it cannot be sustained. Hence we do not need to consider whether the crime is so great that it may be punished by the most severe of all punishments next to loss of life itself—banishment.

B. *Section 401(e).* Our additional comment with respect to this subsection is basically the statement of our complete disagreement with the Government's characterization of the implications of voting. Congress has here undertaken

to say that voting, under any and all circumstances, is conclusive evidence of abandonment of citizenship. The Government's brief, significantly, does not go so far; it speaks only of what is "normally" the case (p. 39). Even on that more limited basis—which does not suffice to sustain the absolute rule of the statute—we believe the statement is wrong. When a foreign country permits an American citizen to vote, his exercise of that right does not, we submit, connote "a strong attachment to that state", or evidence "a form of political allegiance" (Gov't Br., p. 39). It shows an interest in the affairs of a place where one may be temporarily resident, but to express—by a vote—a preference as to whether beer or wine should be sold in a Canadian town, or to seek—by a vote—to prevent a Communist form of government in a country friendly to the United States, has nothing to do with attachment or allegiance to a foreign state. Because voting in a foreign political election might, under some circumstances, imply political allegiance to a foreign state, is certainly no sufficient basis for a conclusive presumption to that effect.[7]

The lack of rational connection between voting in a foreign election and allegiance to the United States is also illuminated by two other considerations. In the first place, subsection (e) appears to have originated in a desire on the part of Congress to penalize certain American citizens who had taken an active part in the affairs of the Fascist governments of Germany and Italy in the early 1930's, and who particularly had voted in the Saar plebiscite of January 1935. On February 15, 1935, H. R. 5799, 74th Congress,

[7] Perhaps there is no reason why Congress must be consistent in this field, but there is a certain inescapable irony in the claim that voting in a foreign political election necessarily forfeits citizenship because of the political allegiance which it connotes, whereas becoming a foreign princess and the mother of a future foreign ruler, as has recently occurred to a well-known American citizen, has no effect on her American citizenship.

was introduced. The Committee on Immigration and Naturalization of the House of Representatives reported it favorably (H. Rep. No. 216) stating that the purpose of the bill was "to provide *the penalty of loss of citizenship and nationality* upon any citizen or national of the United States who may hereafter leave the United States and vote in a political election in a foreign state * * *" (italics supplied) Subsection (e) of Section 401, which followed five years later, is identical, in substance and closely parallel in the words, to H. R. 5799. Fifteen years later, a special subcommittee of the House Judiciary Committee, referring to and quoting from the earlier report, stated that it "agrees that the purpose of Section 401(e) is * * * 'to serve lawful notice that hereafter citizenship * * * does not carry with it any loophole through which voting in foreign states may be done without penalty to the citizen so exercising foreign suffrage.'" H. Rep. No. 1469, 81st Con., 2d Sess., p. 9.

In the second place, the arbitrary and sweeping character of the assumption as to the significance of voting upon which subsection (e) is sought to be sustained has been repudiated, from time to time, by Congress itself. In 1946, Congress provided that all American citizens who had up to that time voted in political elections in any state other than one at war with the United States could regain their prior citizenship status by taking, within a year, an oath of allegiance to the United States. Act of August 7, 1946, c. 769, 60 Stat. 865. In 1951, it extended the same rights to those who had voted in Italian elections in 1946 and 1948 (Act of August 16, 1951, c. 321, 65 Stat. 191), and in 1954 to those who had voted in Japan between 1945 and 1952 (Act of July 20, 1954, c. 553, 68 Stat. 495).

Having originated as a penalty, and having become overburdensome in many instances because of its sweeping, un-

warranted and conclusive assumptions, it cannot now be sustained as simply a rational judgment, immune from judicial examination, that foreign voting is so inconsistent with true American citizenship that they cannot co-exist. It remains, in fact, as it was when it was first introduced into the law in 1940—a penalty for conduct Congress doesn't like. It should be so evaluated, and be declared invalid.

Respectfully submitted,

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APRIL, 1957.